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No. 94-820

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

METROPOLITAN STEVEDORE COMPANY,
Petitioner,
v.
JOHN RAMBO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS, MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC., SHIPBUILDERS COUNCIL OF AMERICA, THE ALLIANCE OF AMERICAN INSURERS, AND SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD. IN SUPPORT OF PETITIONER

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THE INTERESTS OF AMICI CURIAE

The National Association of Waterfront Employers (NAWE), formerly the National Association of Stevedores (NAS), is a not-for-profit tax exempt [26 U.S.C.

§ 501(c)(6)] trade association organized under the laws of the District of Columbia whose 33 member companies are stevedore contractor/marine terminal operators doing business at 110 ports on all four of the nation's seacoasts, the states of Alaska and Hawaii, and the Commonwealth of Puerto Rico. With the exception of the Puerto Rico members, every NAWE member company employs longshore labor engaged in maritime employment subject to the Longshore and Harbor Workers' Compensation Act (LHWCA).

The Master Contracting Stevedore Association of the Pacific Coast, Inc. (MCSA) is a not-for-profit trade association whose 15 member companies provide contract stevedoring services in all principal ports in the states of California, Oregon and Washington, and provide substantially all the marine terminal and stevedoring services performed by private contractors to ocean-going vessels calling at ports in those states. MCSA member companies employ a work force of approximately 10,000 longshoremen and clerks who are engaged in maritime employment subject to the LHWCA.

The Shipbuilders Council of America (SCA) is a not-for-profit trade association whose member companies are shipbuilders, ship repairers, and component manufacturers located in all sections of the country. Shipyard workers employed by SCA member companies are engaged in maritime employment subject to the LHWCA.

The Alliance of American Insurers is an association of 214 insurance companies whose member companies write property and casualty insurance, including state workers' compensation and federal LHWCA insurance, employers' miscellaneous or general liability throughout the United States.

Signal Mutual Indemnity Association, Ltd. is a group self-insurance facility authorized by the Secretary of Labor to secure the benefits payable under the LHWCA on a

non-profit and cost effective basis for selected employers over the long term.

Amici collectively comprise the majority of insured and self-insured employers and insurance carriers covered by the Longshore and Harbor Workers' Compensation Act and a group self-insurance facility, and thus have an interest in the proper payment of disability benefits to a claimant who later experiences an increased wage-earning capacity.

The parties have consented to the filing of this brief. Letters of consent have been filed with the clerk pursuant to Rule 37.3 of the Court.

SUMMARY OF ARGUMENT

The Ninth Circuit's narrow reading of § 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA"—"Act"), relying on the dated *McCormick S.S. Co. v. United States Employees' Compensation Committee,* 64 F.2d 84 (9th Cir. 1933), reads into the term "change in conditions" a limitation to "change in 'physical' condition[]" that simply is not found in the plain language of the section. Consequently, this interpretation precludes a § 22 modification when a claimant subsequently experiences a real increase in actual wages due to an increased wage-earning capacity, i.e., a change in *economic* conditions. This restrictive interpretation, in fact, renders useless the wage-earning capacity premise underlying the entire LHWCA scheme for the payment of disability benefits.

A close reading of the statute fully supports the Fourth Circuit's contrary conclusion in *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985). That Court found that § 22 permits modification on bases other than that of a change in physical condition and specifically sanctioned modification for a change in economic condition resulting from an increased wage-earning capacity.

The *Fleetwood* Court's reasoning is consistent with the wage-earning capacity premise woven throughout the fabric of the LHWCA and specifically set forth at LHWCA § 8(h). Applied properly, this provision, which requires the Department of Labor to consider both physical and economic factors in making the initial determination of wage-earning capacity, also governs subsequent § 22 modification determinations. *Amici* submit that an increased wage-earning capacity is ordinarily sufficient justification to trigger a § 22 modification. And, as the Department of Labor's administrative adjudications below acknowledged, a complete cessation of wage-earning *incapacity* can be sufficient to terminate disability benefits.

Any other result can only be reached by reading out of the Act its wage-earning capacity premise, including the express economic factors set forth in LHWCA § 8(h). Such a reading is clearly not supported by the plain language of the LHWCA, including § 22, several specific amendments made to the Act in 1984, or its legislative history. Moreover, unless reversed, the Ninth Circuit's reading will also frustrate the public policy underlying the recently enacted Americans with Disabilities Act of 1990, P.L. 101-336, 42 U.S.C. § 12101 *et seq.*

ARGUMENT

I. THE UNDELYING WAGE-EARNING CAPACITY PREMISE AND PLAIN LANGUAGE OF THE LHWCA ALLOW § 22 MODIFICATION FOR A SUBSEQUENT INCREASE IN A CLAIMANT'S WAGE-EARNING CAPACITY

A. The LHWCA Statutory Scheme For Calculating Disability Benefits Is Based On 'Wage-Earning Capacity'

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA"—"Act"), is a federal workers' compensation statute designed to provide indemnity compensation and medical benefits to certain classes of maritime employees injured on covered worksites.[1] *Northeast Marine Terminal Company, Inc. v. Caputo,* 432 U.S. 249 (1977). Like the New York Compensation Statute upon which it was modeled after this Court held that state compensation statutes could not constitutionally reach injuries incurred upon the navigable waters of the United States, *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917), and that Congress could not delegate regulation of federal maritime jurisdiction to the states, *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920), § 8 of the LHWCA, 33 U.S.C. § 908, sets forth four distinct classifications of indemnity benefits, labeled "disability" benefits, designed to recompense disabled workers according to the severity and length of the disability. *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs,* 449 U.S. 268, at 273 (1980). In turn, the LHWCA expressly defines the term 'disability,' to mean, in pertinent part, "incapacity because of injury to earn the wages which the employee was re-

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[1] The LHWCA distinguishes between disability claims and medical claims. The Act provides a separate method to determine and recompense disabled workers for the latter. LHWCA § 7, 33 U.S.C. § 907. Medical benefits are *not* subject to § 22 modification.

ceiving at the time of injury in the same or any other employment[.]" [2]

The concept of wage-earning capacity is inherent in the two sections of the Act dealing with disabilities that are 'total' in character. LHWCA §§ 8(a) and (b). To be totally disabled—whether permanently or partially—is to be without any wage-earning capacity whatsoever. In analyzing an initial claim for total disability, the Department of Labor applies the essential wage-earning capacity factors found in LHWCA § 8(h), including the economic factors discussed below.[3] See *Longshore Desk Book*, pp. 8.8-8.18, Benefits Review Board, United States Department of Labor (1987).

The Appellate Courts agree that wage-earning capacity is largely an economic concept. See, e.g., *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 381 (4th Cir. 1994) ("Because of the statutory focus on 'the claimant's *capacity* for work, not actual employment,' disability under the LHWCA is 'an economic, rather than a purely physical, concept.' ") (citations omitted); *Amer-*

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[2] LHWCA § 2(10), 33 U.S.C. § 902(10), was part of the House amendment to the original Senate bill, and a cornerstone of the 1927 Act. See Congressional Record 5403 (March 2, 1927); it originally read as printed above. The 1984 Amendments added new language to the definition dealing with occupational disease. See *Bath Iron Works Corp. v. Director, OWCP*, 113 S.Ct. 692 (1993).

[3] The LHWCA originally provided that claims would be heard by Deputy Commissioners. Since the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, P.L. 92-576, the LHWCA requires that controverted claims be submitted to an ALJ and then to the Benefits Review Board for administrative review, if requested. 33 U.S.C. §§ 919(d) and 921(b)(1). The Secretary of Labor is authorized to administer the provisions of the Act. 33 U.S.C. § 939(a). In turn the Secretary has delegated administrative authority to the Director, Office of Workers' Compensation Programs. 20 CFR § 701.201. For the purposes of this brief, *Amici* chose to refer to any or all of these elements of the Department of Labor as the "Department of Labor."

ican Mutual Insurance Co. of Boston v. Willie B. Jones, 426 F.2d 1263, 1265 (D.C. Cir. 1970) ("The Act makes clear that 'disability' is an economic and not a medical concept."); *John W. McGrath Corp. v. Hughes,* 289 F.2d 403, 405 (2d Cir. 1961) ("[T]his definition [of disability] clearly imposes upon the [Department of Labor] and the reviewing courts the duty to evaluate the extent of a claimant's disability in economic rather than medical terms."). Accordingly, under certain conditions, a claimant may be found to be totally disabled even though he has actual wages because, after considering all of § 8(h)'s economic factors, the claimant is deemed to be without a wage-earning capacity.

Congress was less subtle with the statutory definitions of the two disability classifications that are 'partial' in character. The wage-earning capacity premise of the LHWCA has been expressly incorporated into both definitions: LHWCA § 8(c)(21), 33 U.S.C. § 908(c)(21), ("In all other cases in the class of [permanent partial] disability, the compensation shall be 66⅔ per centum of the difference between the average weekly wages of the employee and the employee's *wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.*") (emphasis added)[4]; and LHWCA § 8(e), 33 U.S.C. § 908(e), ("Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his *wage-earning capacity after the injury in the same or another employment, to be paid during*

[4] Certain permanent partial benefits, i.e., those scheduled at LHWCA § 8(c)(1) through (20), are to be calculated and paid to injured claimants regardless of whether or not the claimant has experienced a loss of wage-earning capacity. See *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs,* 449 U.S. 268 (1980); *Bath Iron Works Corp. v. Director, OWCP,* 113 S.Ct. 692 (1993).

the continuance of such disability, but shall not be paid for a period exceeding five years.") (emphasis added).

The factors determining wage-earning capacity under §§ 8(c)(21) and (e) are set forth in LHWCA § 8(h), 33 U.S.C. § 908(h)[5]: the norm is *actual earnings,* with the Department of Labor required to consider the complete range of physical and *economic* factors, including, "the nature of [the] injury, the degree of physical impairment, [the claimant's] usual employment, and any other factors or circumstances in the case *which may affect his capacity to earn wages* in his disabled condition[]" and fix such capacity "in the interests of justice." Notably, the Department is authorized to take into account the effect of a disability "as it may naturally extend into the future." Wage-earning capacity analysis is done on a case-by-case basis at the initial claim stage. See *Longshore Desk Book,* pp. 8-36.

With the obvious and necessary exception of permanent total disability, the language of the Act describing the three other disability classifications expressly requires payment of the specified benefit "during the continuance" of the stated disability. LHWCA §§ 8(b), (c)(21), and (e). This express temporal condition on these benefit payment classifications has been an integral part of the Act since its enactment in 1927. Thus, even without consid-

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[5] § 8(h) is not an original part of the LHWCA. It was added by the 1938 Amendments to the Act because Congress wanted to settle "the complex question of the proper factors to be considered in connection with the determination of an employee's wage-earning capacity after injury." Congress was primarily concerned with an injured employee's "future ability to earn," particularly where an employee might continue to work for a beneficent employer or where an unscrupulous employer might continue the employment relationship until "the limitations in the act . . . had run" and subsequently fire the injured employee. See H.Rept. 1945, 75th Congress, 3rd Sess.; S.Rept. 1988, 75th Congress, 3rd Sess. Thus Congress was concerned with an injured employee's ultimate wage-earning capacity; a determination that may only manifest itself in the future and be subject to a change in conditions.

ering the plain language of LHWCA § 22 permitting modification of payments or awards for "a change in conditions," as discussed below, it is readily apparent that the Congressional scheme has always allowed for both the termination of disability payments once a claimant's wage-earning capacity is no longer diminished from its pre-injury level and for proportionate reduction of such payments whenever a claimant experiences a subsequent increase in wage-earning capacity, within the constraints of a § 8(h) wage-earning capacity analysis.

Approximately 90% of LHWCA disability claims are not contested and therefore are not subject to an administrative hearing and compensation order. Employers pay most claims voluntarily, i.e., without a compensation order. See *OWCP Annual Report To Congress FY 1993*, Office of Workers' Compensation Programs, U.S. Department of Labor 1994). Whether after an award or voluntary payment, LHWCA § 22 allows modification for a "change in conditions" and requires the Department of Labor to issue a "new compensation order which may terminate, continue, reinstate, increase, or decrease" the disability payments being paid.

B. The Plain Language And Purpose of § 22 Allow Modification For A Subsequent Change In A Claimant's Wage-Earning Capacity

Since the inception of the Act, § 22, 33 U.S.C. § 922, has permitted modification for a "change in conditions" of any compensation award or payments, other than for the 'scheduled' benefits now set forth in §§ 8(c)(1) through (20). See I-D below. Since the 1984 Amendments to the Act, § 22 is the sole LHWCA provision authorizing modification of an award or voluntary payments, and sets forth the procedure for the parties to seek a modification. See I-C below.

Despite the unconditional language and broad sweep of the term "a change in conditions", the Court below rejected both of the Labor Department's administrative

determinations and upheld dated circuit precedent. As the Court explained, "[M]ere change in a claimant's wages, training, skills, or educational background is not sufficient to meet the 'change in conditions' requirement. . . . Rather a party seeking to modify an award must prove that the claimant has undergone a change in his physical condition." *Rambo v. Director, Office of Workers' Compensation Programs,* 28 F.3d 86 (9th Cir. 1994).

The flaw in the Court's reasoning is readily apparent. At the time of an award, a determination of wage-earning capacity frequently is no more than an educated guess on the part of the administrative adjudicators. Voluntary benefit payments suffer as well from the same shortsightedness. An original determination of wage-earning capacity utilizing LHWCA § 8(h) economic factors, as noted above, is based on conjecture including "the effect of the disability as it may naturally extend into the future." Subsequent changes in wage-earning capacity, brought about, for example, by successful retraining in a more lucrative employment, as below, simply cannot be foreseen at the time of the initial award. Consequently Congress expressly incorporated the § 22 modification provision into the LHWCA with the broadest possible test allowing for a new award, i.e., "a change in conditions." This is certainly designed to correct any initial determination of wage-earning incapacity that may have proven wrong "into the future."

The decision below ignores the central importance to the LHWCA of § 8(h)'s economic wage-earning capacity factors. *Amici* submit that these factors used to determine wage-earning capacity at the initial award stage are, in fact, the range of conditions that Congress anticipated could subsequently change, and hence be subject to a § 22 modification order.

While the Ninth Circuit's limitation to "change in 'physical' conditions" may appear to have the desired characteristics of a simple *per se* rule, it ignores the eco-

nomic factors set forth in § 8(h) that must be considered whenever a claimant's wage-earning capacity is called into question. More importantly, in choosing to substitute its judgment for that of Congress, the Court below ignores the unambiguous expression of Congressional intent to permit § 22 modification for the unconditional "change in conditions" and opinions of this Court governing statutory interpretation. "The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Cowart v. Nicklos Drilling Co.*, 505 U.S. ——, 112 S.Ct. 2589, 2594 (1992); "When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances." *Demarest v. Manspeaker*, 498 U.S. ——, 111 S.Ct. 599, 604 (1991); "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1983).

On the other hand, the Department of Labor did recognize Congressional intent in making the § 22 modification below, and considered the economic factors set forth in § 8(h), just as it did with the initial award. Since *Fleetwood*, this has become the standard practice and position of the Department.[6] The Department understands that § 22 modification, properly governed by § 8(h) factors, is consistent with, and necessitated by, the wage-earning capacity premise of the Act. Both of the Department's adjudications below acknowledged this linkage.

Amici submit that the legislative term "change in conditions" encompasses a claimant's real increase in actual earnings subsequent to the initial determination of wage-earning capacity, thus permitting modification due to an

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[6] See *Longshore Desk Book*, p. 22-3, Benefits Revied Board, U.S. Department of Labor (1987).

increased wage-earning capacity. The very essence of the Act's disability scheme requires no less.

C. The 1984 Amendments Reaffirm Congressional Intent To Permit Modification Upon A Subsequent Change In Wage-Earning Capacity

Congress last amended the LHWCA in 1984 in an effort to control what had by then become a very costly compensation program. "One major thrust of this legislation is to reduce the costs of providing benefits under the LHWCA." S. Rept. 98-81, p. 41, 98th Congress, 1st Session. Included within the Longshore and Harbor Workers' Compensation Act Amendments of 1984, P.L. 98-426 (the "1984 Amendments") are several amendments dealing with runaway costs and the widespread abuse common to the program. One of these amendments deals specifically with policing of the LHWCA § 44 Special Trust Fund into which employers are permitted to place § 8(f) claims, as the Petitioner did in this case.[7]

Three particular changes made by the 1984 Amendments defeat the decision below. Section 8(c)(1) amended LHWCA § 8(c)(21) to delete the then existing authority, which had been in the statute since its inception, of the Department of Labor "to reconsider[] the degree of such [permanent partial] impairment[.]" As explained in the accompanying Senate Report, this was

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[7] LHWCA § 8(f) is designed primarily to encourage the hiring of disabled workers by not saddling an employer who hires a disabled employee with the full costs of a second disabling injury. The employer can place the claim into the § 44 Special Trust Fund after 104 weeks of benefit payments. In Calendar year 1993 the § 44 Special Trust Fund collected over $102 million dollars in assessments from covered employers and insurance carriers, and paid out over $103 million dollars to some 4,652 second injury fund claimants and others qualifying for secondary § 44 benefits. *OWCP Annual Report To Congress FY 1993*, Office of Workers' Compensation Standards, Employment Standards Administration, United States Department of Labor. *Amici* believe that the fund has an unfunded liability in excess of $1.5 billion.

done to "limit[] the method for *modifying or reconsidering the degree of disability* to that provided in § 22[]," and to "make[] *determinations of wage earning capacity* subject [solely] to section 22 modification." S. Rept. 98-81, 98th Cong, 1st Sess., pp. 43 and 18, respectively (emphasis added).[8]

Also of obvious importance, § 8(h) of the 1984 Amendments added a new § 8(j) to the LHWCA, 33 U.S.C. 908(j), which permits employers the right to obtain, semi-annually, wage and income statements from disabled workers receiving compensation.[9] There can be

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[8] S. Rept. 98-81 sheds further light on Congressional understanding of the "basis (sic) or grounds" for seeking a § 22 modification. The Committee of jurisdiction fully expects that § 22 modification, whether within the present one year time limitation or without, as proposed by the legislation then under consideration, permits claimants to "apply for increased benefits for wage loss or for greater physical disability at a time *when the full effects of an injury may manifest themselves.*" S. Rept. 98-81, pp. 37-38, (emphasis added). This expectation fully comports with the wage-earning capacity premise of § 8(h) of the Act, as noted above. See n.12, *infra*, for an explanation of the changes actually made to § 22 in 1984.

[9] LHWCA § 8(j) reads in its entirety:

(j)(1) The employer may inform a disabled employee of his obligation to report to the employer not less than semiannually any earnings from employment or self-employment, on such forms as the Secretary shall specify in regulations.

(2) An employee who—

(A) fails to report the employee's earnings under paragraph (1) when requested, or

(B) knowingly and willfully omits or understates any part of such earnings,

and who is determined by the deputy commissioner to have violated clause (A) or (B) of this paragraph, forfeits his right to compensation with respect to any period during which the employee was required to file such report.

(3) Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation pay-

only one reason for this particular change. In keeping with the Act's fundamental wage-earning capacity premise, as outlined above, Congress granted to employers and insurance carriers statutory authority to periodically police their rolls of disabled claimants, including those placed in the § 44 Special Trust Fund, in order to check for disabled workers who had experienced an increase in wage-earning capacity subsequent to the original award or voluntary payment.[10] Logically, given the LHWCA § 8(c)(21) change discussed above, Congress certainly intended § 22 modification to become the next step in the process if and when a wage and income check reveals an increased wage-earning capacity on the part of a claimant.

The primary sponsor of the new § 8(j) certainly expected as much. He explained the rational behind this language during floor debate on a precursor of the bill that was eventually enacted.[11]

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able to the employee in any amount and on such schedule as determined by the deputy commissioner.

The regulations later promulgated by the Director, OWCP implementing the new § 8(j) faithfully reflect the intent of the statute and can be found at 20 CFR Ch. VI § 702.285 and § 702.286. The Director has also published a standard form, LS-200, as the statute so requires, for the use of employers and insurance carriers. See the Director's *Longshore Procedure Manual,* Office of Workers' Compensation, Employment Standards Administration, U.S. Department of Labor, ch. 10-200 (Sept. 1989).

[10] Annual policing the Special Fund was standard procedure for the Director, Office of Workers' Compensation Programs at the time of the 1984 Amendments, and was subsequently made part of OWCP Regulations, 20 CFR § 702.285. See 50 Fed. Reg. 389 (Jan. 3, 1985). The Director also utilizes the LS-200 forms to monitor a claimant's employment status, and matches this data with other government records. If and when a claimant is found to have an increased wage-earning capacity, the Director will seek a § 22 modification, be it voluntarily or not on the part of the claimant. See the Director's *Longshore Procedure Manual,* ch. 6-300.

[11] The new § 8(j) language originally appeared as § 7(h) of S. 1182 in the 97th Congress; it was replicated as § 7(h) of S. 38

> "Further, a disabled employee has the obligation to report to his employer not less than semi-annually any earning (sic) from employment. . . *This provision is in response to the problem of a disabled employee receiving workers' compensation benefits while he has actually returned to gainful employment.*" (emphasis added) Cong. Record page 9210, July 27, 1982 (Statement of Nickles, Senator).

Finally § 16 of the 1984 Amendments in turn amended LHWCA § 22, *inter alia*, to make it clear that employers and insurance carriers which had previously placed claims in the LHWCA § 44 Special Trust Fund, pursuant to LHWCA § 8(f)'s second injury provisions, could seek modification under § 22, as Petitioner has in the present case.[12]

All three of these changes conform with the wage-earning capacity premise inherent throughout the LHWCA since its inception, and further undermine the Ninth Circuit's reasoning below.

D. The Pre 1984 Legislative History Of § 22 Does Not Support The Ninth Circuit's Narrow Reading

As noted above, LHWCA § 22's "change in conditions" language dates to the original Longshoremen's and Har-

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in the 98th Congress. S. 38, as introduced, was identical to S. 1182 as passed the Senate on July 27, 1982 in the 97th Congress; it was later enacted in the 98th Congress after further amendment. P.L. 98-426. The language that finally became § 8(j) of the LHWCA is identical to that first introduced as § 7(h) of S. 1182 in the 97th Congress.

[12] Despite the fact that in 1984 both the Senate and House passed bills contained identical language deleting the present one year time limitation on § 22 modification, the Conference committee dropped this change in favor of language permitting the policing of the § 44 Special Fund by employers and carriers, without any explanation. See S. Rept. 98-81, H.Rept. 98-570, H.Rept. 98-1027 (the Conference Report). The initial House Report at page 29 points out that § 22 modification is permitted "on the grounds of changed circumstances or mistakes."

bor Workers' Compensation Act of 1927. See S. Rept. 973, 69th Cong., 1st Sess.; H. Rept. 1767, 69th Cong., 2d Sess. Neither report gives any indication that Congress intended to limit the term to the restrictive reading later adopted by the Ninth Circuit in *McCormick*.

Shortly after *McCormick*, Congress amended the Act in 1934 and added "mistake in determination of fact" to the original "change in conditions" upon which a modification order could be obtained. Congress did this "so as to broaden the grounds" for modification orders and fully expected to see "increase[s] or decrease[s] in [] compensation . . . when changed conditions or a mistake in a determination of fact makes such modification desirable in order to render justice under the Act. . ." S. Rept. 588, 73rd Cong., 2d Sess., p-3; H. Rept. 1244, 73rd Cong., 2d Sess., p-4.

Once again, Congress gave no indication that the term "change in conditions" was to be construed as narrowly as in *McCormick*. In fact Congress never even acknowledged the existence of the decision, but instead chose to grant wide discretion to the Department of Labor to make those modifications "desirable . . . to render justice under the Act." As of this time the Act did not have a definition of "wage-earning capacity" to guide the Department of Labor. See n.5, *supra*. It seems likely, then, that this amendment to § 22 was an attempt to comport the Act's wage-earning capacity premise, including the economic factors later explicitly made a part of § 8(h), with § 22 modifications.

II. THE NINTH CIRCUIT'S DECISION UNDERMINES FEDERAL PUBLIC POLICY MANDATES CONCERNING THE HIRING OF HANDICAPPED WORKERS

The question before the Court takes on added significance when considered in light of recent public policy changes concerning the hiring of handicapped workers.

All but a handful of employers covered by the LHWCA are now also covered by the hiring mandates of Title I of the Americans with Disabilities Act, P.L. 101-336 (the "ADA").[13]

Amici appreciate the fact that this Court does not address hypothetical questions, and has not yet had the opportunity to review the ADA but point out that, should this Court uphold the decision below, the ADA mandate to hire and promote the disabled would be seriously undermined. The ADA requires that LHWCA covered employers not "discriminate against a qualified individual with a disability . . . [in] the hiring, advancement, or discharge of employees. . . job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112. Often this statutory protection will encompass those with work related injuries receiving compensation payments pursuant to either the LHWCA or a state worker's compensation act. Many, but not all, such individuals are indeed disabled to the point that their disability "substantially limits one or more of the major life activities of such individual" and thus would qualify for the protections of the ADA. 42 U.S.C. § 12102(2).

Indeed, *Amici* submit that the facts in this case meet this test. Respondent Rambo's back and leg injuries, characterized as permanent partial by the initial ALJ decision in 1983, were thought to have impaired his abil-

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[13] Title I of the ADA became effective on July 26, 1992 for employers with 25 or more employees. Two years later the threshold dropped to 15 or more employees. 42 U.S.C. § 12111. Few, if any, employers covered by the LHWCA have fewer than 15 employees. LHWCA covered employers also pay for vocational rehabilitation. LHWCA § 939(c)(2) directs the Department of Labor to arrange for the vocational rehabilitation of permanently disabled employees. 33 U.S.C. § 939(c)(2). Presently some $4.8 million is annually expended from the § 44 Special Fund on vocational rehabilitation. See *OWCP Annual Report To Congress FY 1993*, Office of Workers' Compensation Standards, Employment Standards Administration, United States Department of Labor, p. 43.

ity to earn his usual wages as a longshoreman, thereby reducing his wage-earning capacity. Ultimately, of course, this assumption proved incorrect.[14]

While the facts as they unfolded all took place prior to the effective date of the ADA, and thus were not argued below, *Amici* submit that the public policies underscoring the ADA cannot be ignored in the context of employer financial obligations under the LHWCA and other workers' compensation statutes. Employers cannot be expected to incur both financial liabilities. Therefore *Amici* believe that LHWCA § 22 modifications need to be construed in light of the ADA.

CONCLUSION

The court below read a limitation into the Act that simply is not there. By limiting § 22 modification to "change in 'physical' condition[]" the Ninth Circuit has repudiated the wage-earning capacity premise underlying the LHWCA. Permitting continued recompense to employees with an increased wage-earning capacity is simply not within the statutory scheme. Congress intended, and the LHWCA so provides, that if and when a disabled worker's actual wages increase to the point where they equal or exceed his/her pre-injury level of earnings, the factors used to determine statutory disability may be re-examined, and the disability may, in fact, be deemed to cease. Section 22 modification is the procedure provided by the LHWCA for an employer to seek termination or reduction of benefits for a "change in conditions," as the

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[14] Petitioner, the original employer of the Respondent, is a member of the Pacific Maritime Association ("PMA"), the designated multi-employer management group that collectively bargains with the International Longshoremen's and Warehousemen's Union ("ILWU"). The training program that Respondent successfully completed is jointly sponsored by PMA-ILWU. Respondent is now eligible to be employed by any PMA member, including Petitioner, as a crane operator with seniority rights.

facts dictate, thus maintaining consistency with the statutory scheme.

Amici appreciate that this is a two edged sword, *i.e.*, that modification works both ways, and that an injured employee's wage-earning capacity may decrease over time, thus compelling a modification upward. But this is the way Congress designed the LHWCA to work.

Amici submit that the Ninth Circuit's interpretation of § 22 is clearly insupportable and must be reversed.

Respectfully submitted,

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